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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **27/02/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY LIAM HABERLIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

RULING ON ADMISSIBILITY OF FRESH EVIDENCE

The Applicant appeared in person
Conor Fegan (instructed by Arthur Cox) for the Proposed Respondent
William Orbinson KC (instructed by TLT NI LLP) for the Notice Party

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HUMPHREYS J

Introduction

[1] The applicant is a resident of Eglinton who seeks leave to challenge a decision of the Planning Appeals Commission ('PAC') to grant planning permission for a housing development at Ballygudden Road in the village.

[2] The proposed development site is situated to the rear of the applicant's property and is adjacent to a field known as "The Points." The Castle River flows alongside The Points and close to the site.

The planning application

[3] A planning application for 97 units on the site was submitted in September 2017 by MG Famco Limited, the notice party to this application, to Derry City and Strabane District Council ('the council'). It was refused on 12 October 2021 for a single reason:

> "The proposal is contrary to the Derry Area Plan 2011 para 2.5 of page 166 in that the woodland provides a strong defining edge to the south eastern edge of Eglinton and

> acts as a visual buffer to the more open agricultural land along the Ballygudden Road. There will be a strong presumption against development in this area."

[4] This refusal was appealed to the PAC who dismissed the appeal on 31 March 2023.

[5] The notice party commenced judicial review proceedings and, by consent, the PAC decision was quashed on 8 June 2023 by Colton J.

[6] The appeal was remitted to a different commissioner and the notice party submitted a revised site layout plan reducing the number of dwellings from 97 to 77. A hearing took place on 6 November 2023. On 2 August 2024 the appeal was allowed and planning permission granted for 77 units, together with the creation of new access, associated infrastructure and ancillary works.

[7] In the course of the appeal decision, the commissioner identified the main issues for determination, namely whether the development would:

(i) Be in compliance with the Derry Area Plan;

(ii) Be at risk from flooding;

(iii) Constitute a quality residential environment;

(iv) Be at risk from unacceptably adverse noise and odour impacts;

(v) Adversely affect protected flora and fauna; and

(vi) Prejudice road safety and result in congestion.

[8] The commissioner found that the council's sole reason for refusal was not sustained. He considered the issue of flooding, raised by the objectors, and the compliance of the proposed development with Planning Policy Statement 15 ('PPS 15') on Planning and Flood Risk. Policy FLD 1 of PPS 15 provides that development will not be permitted within the 1 in 100-year fluvial flood plain unless the proposal falls within one of the exceptions to the policy.

[9] The commissioner found that the proposal did fall within an exception since the only area within the site which fell into the flood plain was proposed as amenity open space. Accordingly, in accordance with FLD1, planning permission would only be granted if the Flood Risk Assessment ('FRA') demonstrates that:

(a) All sources of flood risk to and from the proposed development have been identified; and

(b) There are adequate measures to manage and mitigate any increase in flood risk arising from the development.

[10] The commissioner considered the FRA dated July 2021 which accompanied the planning application. The objectors contended that the data modelling underpinning this FRA was inaccurate and related to site levels which existed prior to the removal of illegally dumped infill material at The Points. It was asserted on the part of the objectors that the flood extents were properly represented by a previous 2014 flood hazard map. However, the commissioner noted that both the council and the Department for Infrastructure Rivers Division ('DfI Rivers') accepted the July 2021 modelling and, having weighed up the evidence, he also accepted it.

[11] Unauthorised infilling had taken place at The Points in April 2015 and this resulted in an enforcement notice being served by the council in December 2018. Works to remove some of this infill took place in May 2024, some months after the PAC hearing, and the objectors wrote to the commissioner seeking permission to file further evidence as a result of this, which was granted.

[12] In their submission on this issue, the objectors asserted that the recent works entailed the creation of an earthen bank, 240 metres in length, which appeared to have been installed to protect the new development from flooding but which would place other properties at risk. It is asserted that the works were undertaken on behalf of the developer, the notice party. The objectors also indicated that they had asked DfI Rivers on 30 April 2024 to remodel the flood plain.

[13] On 23 May 2024 the developer responded stating that the findings of the July 2021 FRA remained valid, the development was situated outside the flood plain and policy FLD1 was satisfied. The council also commented on 28 May 2024:

> "Council have also sought advice from DfI Rivers in relation to the latest issue raised by third parties to the appeal. DfI Rivers have confirmed that material has been excavated from the field between the appeal site and the Castle River. DfI Rivers also advise that it is likely that this work will alter the flood plain extents, however, the extent of this is currently unknown."

[14] At some stage before 23 July 2024 further works took place in The Points which entailed the partial removal of the earthen bank. No steps were taken to bring this to the attention of the commissioner.

[15] In relation to the post-hearing submissions, the commissioner acknowledged the council's comments regarding the position of DfI Rivers. However, having considered the evidence, he concluded:

> "I agree with the Appellant's position that with the reduction in levels adjacent to the appeal site, it would (in broad terms) serve to reduce water levels slightly as a consequence of increased storage and conveyance capacity in the floodplain at The Points. I am therefore not persuaded that the recent groundworks invalidate the Appellant's overall assessment in regard to flood risk, including the most recent analysis in relation to overland flooding. The matter of a potential earthworks bank along the western site boundary does not form part of the appeal development. Whilst the Objectors considered that no development on the appeal site should be allowed until DfI Rivers remodel the floodplain at The Points to factor in the more recent flood events and final post-enforcement works levels at The Points, I am not persuaded that this would be justification for withholding planning permission given the information before me." (para [40])

[16] Ultimately, the commissioner concluded that there was no evidence that the levels used in the FRA were inaccurate or that its conclusions had been undermined. He noted that DfI Rivers accepted the levels used and was therefore satisfied that no buildings within the development would be constructed within the flood plain and the objectors' case on this issue was not sustained.

The grounds for judicial review

[17] The grounds of challenge advanced by the applicant are wide-ranging but, for the purposes of this issue, the relevant grounds are as follows:

(i) Illegality

[18] This centres on the requirements of FLD1 in PPS15 and the commissioner's acceptance of the FRA. The applicant says that the commissioner has effectively sanctioned development in the flood plain. It is pleaded that, as a result of the works carried out in July 2024, the May 2024 analysis became obsolete. Equally, it is argued that the failure by the commissioner to consult with DfI Rivers on the May 2024 analysis was unlawful.

(ii) Procedural Unfairness

[19] It is contended that the commissioner acted in a procedurally unfair manner by failing to adequately consider the objectors' representations and consult with DfI Rivers, and/or by failing to obtain an updated flood assessment from DfI Rivers.

(iii) Irrationality

[20] The applicant says that the PAC decision was irrational in that no reasonable decision maker could have arrived at it, and that it was based on immaterial considerations in the form of outdated data and analysis.

The new evidence

[21] The application for leave was listed for hearing on 6 February 2025. The day before, the applicant sought leave to file a supplemental affidavit, exhibiting an updated flood map produced by DfI Rivers on 4 February 2025. According to the applicant, this was "modelled without infill and incorporates the partial removal and lowering of the earthen bank" and "demonstrates that the commissioner has approved development within the flood plain."

[22] The case is made that flood risk was central to the planning application and to the hearing before the PAC and forms one of the grounds upon which the applicant seeks to impugn the grant of planning permission. The applicant says that this evidence provides the most recent and authoritative assessment of the flood risk and should therefore be admitted in evidence in these proceedings.

[23] The applicant therefore seeks to adduce evidence of material which was not before the PAC at the time the decision was made in August 2024. In this judgment I use the term 'fresh evidence' as shorthand for such material.

The legal principles

[24] Coulson LJ, in *Kenyon v Secretary of State for Housing* [2020] EWCA Civ 302, made the following important statement of general principle:

> "In judicial review proceedings it is generally inappropriate for parties to seek to rely on documents (and to advance arguments based on those documents) which were not available to the decision-maker. Taken at its highest, such an approach undermines the entire process of judicial review. It runs the risk that the court will be asked to conduct a kind of rolling review, in which nothing is ever finalised or settled, and it does not matter what information was available at the time the decision was taken. This serves only to encourage the all-too-prevalent attitude that, in judicial review applications, it is always possible to 'have another go.'" (para [28])

[25] In this jurisdiction, and in the context of a challenge against a decision of the PAC, McCloskey LJ observed, in *Re Coulters Hill Residents Limited's Application* [2020] NIQB 1:

> "The PAC is a judicialised body. It is trite that judicialised bodies decide cases on the basis of the evidence presented to them. I do not exclude that there may be – and indeed may have been – cases in which the High Court in the exercise of its supervisory judicial review jurisdiction may be – or may have been – persuaded to conduct the exercise of identifying a legal deficiency in the decision of the judicialised body in question through the prism of leaving out of account some material fact or consideration. However, given the conduct and history of these proceedings, coupled with the protracted underlying history, I consider that this is not such a case. This is so not least because of the intrinsic undesirability of this supervisory court, as a 'first receiver', conducting an exercise of evaluating significant new evidence as a means of determining whether it should interfere with the decision of the judicialised body under challenge. In this respect the differences between the forum, procedures and powers of the PAC and those of this court of supervisory superintendence are striking. The supervisory jurisdiction of this court should generally not be invoked in this way." (para [36])

[26] The classic statement of the law on the admission of fresh evidence in judicial review proceedings can be found in the judgment of Dunn LJ in *R v Secretary of State for the Environment ex p. Powis* [1981] 1 WLR 584. The following categories were identified:

> (a) Evidence showing what material was before or available to the decision-maker;
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> (b) Evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended;
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> (c) Evidence relevant in determining whether a proper procedure was followed; and
>
> (d) Evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.

[27] In *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin) the Divisional Court in England & Wales commented that these categories ought not to be treated as exhaustive and recognised that, in modern judicial practice, expert evidence may be admitted on a rationality challenge where the court requires to have an understanding of technical matters in order to comprehend the reasons relied upon.

Consideration

[28] It is apparent that the fresh evidence upon which the applicant seeks to rely does not fit within any of the *Powis* categories. It does not demonstrate what material was before the decision maker since there is no dispute in this regard. The FRA and associated material taken into account by the decision maker is aptly set out in the PAC decision. Equally, it does not speak to the jurisdiction of the decision maker.

[29] The applicant does say that it shows a proper procedure was not followed by the PAC and that DfI Rivers ought to have been required to produce this updated flood map prior to the decision being arrived at. However, PPS 15 at para 5.3 et seq sets out a procedure whereby a developer may be required to produce an FRA as part of a planning application and DfI Rivers is consulted by the planning authority in relation to flood risk and mitigation. The planning policy does not foresee that the relevant authority would direct DfI Rivers to take certain steps or produce certain documents. DfI Rivers is the agency with statutory competence in the field and may be expected, in its consultation response, to raise any issues or concerns which it may have.

[30] I am not therefore persuaded that the fresh evidence ought to be admitted to demonstrate some procedural impropriety on the part of the PAC.

[31] The applicant's pleaded case in relation to bias can be found at para 5.1(ii)(g) and (h) of the amended Order 53 statement. The applicant says:

(i) The decision to 'align' with the developer's position, without giving sufficient weight to concerns of residents or the information supplied by the competent authority "raised concerns about the impartiality of the process" in light of the fact the developer was involved in both the development and the removal of the infill at The Points; and

(ii) The commissioner's decision to accept the FRA without demanding further independent analysis or validation, including the failure to consult with the DfI regarding the May 2024 analysis "raises significant questions about the impartiality of the process."

[32] Properly analysed, this is not a pleaded case of bias at all. Judicial review proceedings are not a forum to "raise concerns" or pose "significant questions." Bias is a very serious allegation to make against a decision maker and such a case must be properly made and pleaded. If it is alleged that the decision was infected by actual bias, then all the facts which go to establish such a claim must be set out. Similarly, if the claim is one of apparent bias, the Order 53 statement must state why it is said that a fair-minded and reasonable observer, having considered all the facts, would conclude that there is a real possibility of bias.

[33] It is trite to say that merely preferring one party's case to that advanced by the other cannot, of itself, give rise to a sustainable claim of apparent bias. There must be something around the circumstances of the decision making which demonstrate the real possibility of bias. There is nothing in the applicant's pleaded case which begins to establish this.

[34] The fact that this document emerges some six months after a decision has been made cannot, in any event, contribute to the bias question. Whether or not the decision maker was biased, or criteria for apparent bias were established, can only be measured by the events and circumstances which were in play at the time the decision was made.

[35] The updated flood map does not purport to be expert evidence and therefore it could not be admitted on this basis. In any event, the court does not require, in this case, any expert assistance in order to understand the rationale for the decision arrived at by the commissioner.

[36] I therefore refuse the application to admit the fresh evidence. In doing so, I am also cognisant of the strong public interest in finality in the planning appeals process. This has been stressed in two cases in England & Wales in the last year – *Mead Realisations Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin) and *Keep Chiswell Green v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2723 (Admin).

[37] It is only exceptionally that the court exercising supervisory jurisdiction over the PAC will admit fresh evidence which was not before the commissioner at the time the original decision was made. Whilst the updated flood map may well be of significance, and I make no finding in this regard, there is no basis for this court to consider it as part of a challenge to the lawfulness of the commissioner's decision.

Alternative Remedy

[38] As was stressed by both the proposed respondent and the notice party, if the applicant can demonstrate that, by reference to the new flood map, that the planning permission ought not to have been granted, then he is not left without a remedy. By virtue of sections 68 and 72 of the Planning Act (Northern Ireland) 2011, either the council or the Department may revoke or modify a planning permission where it is "expedient" to do so. In the event that either authority declined to revoke such a permission after having been invited to do so, then there would be a public law decision amenable to potential challenge.

Conclusion

[39] I therefore refuse the application to admit the fresh evidence and will proceed to hear the application for leave.